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Finley F. Wilkinson; Harold N. Wilkinson; H. H. Wilkinson v. Carlos Wood : Brief of Appellant

Utah Supreme Court

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In the Supreme Court of the State of Utah

FINLEY F. WILKINSON,
HAROLD N. WILKINSON AND
H. H. WILKINSON,
Plaintiffs and Respondents,

— vs. —

CARLOS WOOD,
Defendant and Appellant.

Case No.
8832

BRIEF OF APPELLANT

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NATURE OF THE CASE

Respondents brought action against Appellant seeking enjoinment of a wall along a right of way, for removal of said wall by Appellant and for damages. The case was submitted to the Jury by the Trial Court on Special Interrogatories and from the Findings of Fact and Con-

clusions of Law and Judgment of Trial Court based thereon and by which Judgment Respondents were granted the right to remove certain portion of said wall and awarded nominal damages Appellant prosecutes this Appeal.

STATEMENT OF FACTS

On November 30, 1953 by Warranty Deed bearing said date, Respondents obtained from Appellant the following described real property in Davis County, Utah:

> "Beginning at a Point 30 Feet West and 888.88 Feet South from the Northeast Corner of the Northeast Quarter of Section 25, T2N, R1W, Salt Lake Meridian, U. S. Survey and running thence West 256.66 Feet; thence North 52 Feet; thence East 25.66 Feet; thence South 52 Feet; to place of beginning.
>
> Together with a right of way over and through the following described property: Beginning at a point 2.50 chains West and 888.88 feet South from the Northeast Corner of the Northeast Quarter of Section 25, T2N, R1W, Salt Lake Meridian, U. S. Survey and running thence South 11 Feet; thence West 160 Feet; thence North 11 Feet thence East 160 Feet to place of beginning.'

Such Instrument is Respondents' Exhibit B and note should be made that this Appellant and Wife executed such Instrument on January 6, 1954. The Right of Way involved in this suit and conveyed in connection with

such other land is 11 Feet in Width and 160 Feet in Length.

Reference is made to Respondents' Exhibit A, a Certificate of Survey, for more clarification of the exact locations of the respective properties of the parties hereto and said Right of Way. Respondents' Exhibit C, a Diagram or Map, is noted as showing the Right of Way in Red with the Wall being designated in Blue. The Right of Way is referred to at times in the testimony as the Red Area. Exhibits 4, 5, and 6 of Appellant are Pictures of the Right of Way and the Wall. Further referral to all of such Exhibits will be made as requisite.

Arthur B. Maxwell, an Engineer, and Witness for Respondents testified: He made the Certificate of Survey, Respondents' Exhibit A. (TR. 4) He made a survey of the property upon the ground. (TR. 5) The description contained in the Deed was the same as in the Certificate. (TR. 6) There was a Wall running from the front of the Wilkinson Building to a point approximately even with the front of the Wood building. (TR 7) The wall at one point was 10.76 feet from the south edge of the right of way and at another point 10.48 feet from the south edge of the described right of way. (TR. 7) At the time of survey on December 20, 1955 there was a concrete wall erected on the north of the right of way. (TR. 10 and 11). Its width was six inches. (TR. 11) It was approximately 22 feet running East and West. (TR. 11) He went back 160 Feet and such 160 Feet would stop at a point 14 and a half feet to the rear of the Wilkinson Building.

(TR. 13) From his observation it was being used as a right of way and he had that morning made such observation. (TR. 14) The Witness during a recess further verified his measurements of the wall and thereupon testified that it was an eight inch wall with its total width about seven and three-quarters inches with a capstone nine inches wide. (TR. 19) His Certificate showed it to be an eight inch wall but such fact would not alter the figures he gave as his measurements were made from the inside of the wall. (TR. 20).

Respondent, Finley Wilkinson, testified: That the property shown in Yellow on the Diagram, Respondents' Exhibit C, was the property described in Exhibit B and was 256.66 by 52 feet. (TR. 23) At the time he purchased such property he also purchased the right of way back to the property described as 256.66 by 52 feet. (TR. 24) He thought that for about a year they crossed the line at any point they desired and then at the end of such year three posts about five feet apart in front of the building were erected. Even after that they were able to go between the posts. (TR. 27). They were able to make the same use of the Right of Way as before by crossing between the steel posts. (TR. 28) It was inconvenient to enter the Right of Way from the 11 foot entrance in that they had to go out on the highway to make such entrance. (TR. 28) That they had no other right of way to get from the front property to the storage property that they bought. (TR. 29) Occasionally the right of way was obstructed by his usage of it and also by that of Appellant.

(TR. 29) His estimate of damage was that it took more time to take cars from the garage out on the highway and then down through the right of way. It probably took two to three minutes more. (TR. 31). Average daily loss in man hours was two. (TR. 31) His mechanics were paid $2.20 per hour. (TR. 32) Only other interference with his use of the right of way by the wall being there was they had to maintain space open. If the wall wasn't there they could back cars right out and drive them on to the driveway and down the right of way to the parking lot. It would give him more use of the 11 feet. (TR. 33) The wall was first constructed in December, 1955. (TR. 33) At the time he purchased the 256.66 by 52 feet, he had no right of way over the property of the Appellant. (TR. 35 and 36) The three pipes were placed on the north boundary of the right of way in November, 1954 after he purchased the right of way in January, 1954. (TR. 38) He saw a few of his customers parked in the right of way. (TR. 40) On many occasions Appellant had discussed with him the problem of customers of the witness coming out of the witness place of business and using the right of way to turn around to go south and north. (TR. 41) Besides his help and himself no one used the right of way to go to the back lot of the witness. (TR. 41 and 42) The back lot or 256.66 by 52 feet area was used to keep impounded wrecked cars and to park customer's cars. (TR. 42) They came down the alley every day. (TR. 45) Before the wall was erected the right of way demarcation was indicated by three steel posts. (TR. 47) Because of the inconvenience caused by

the wall, he estimated that he lost 2 hours a day in man power. (TR. 47 and 48) He made no protest when the steel pipes were placed on the line of the right of way because his Attorney had advised him not to stir up any trouble with his neighbor. (TR. 49)

Appellant, Carlos Wood, testified: That he and Mr. Dunn had sold Respondents the property in Yellow, 256.66 by 52 feet, behind their present building with said right of way. (TR. 58) As to the amount of Right of Way, he and Respondent, Harold Wilkinson, measured it and came to a conclusion of 160 feet east and west by 11 feet wide. (TR. 58) The steel posts were put in on Thanksgiving Day of 1953 after a survey had been made for him so that he would be on his property line to put the posts in. (TR. 58) In measuring the right of way width, they measured from the south side of the steel posts to his present building and it was 12 and some odd feet as shown on the map. (TR. 60) The steel pipes were removed to make way for the wall. (TR. 61) The wall was not quite finished. (TR. 62) The steel posts were put in because the way was being used for parking purposes and people were parking there. It was for the benefit of both that it be used as a driveway. (TR. 62) The steel posts were there at the time Respondents bought the property in January, 1954. (TR. 63) Instead of using the "Access" or east entrance to the driveway they would come from the side and use it sideways and come right in to his traffic and it created a bad situation. (TR. 63) His object in building the wall was to make a definite right of way down through the two businesses

and to stop their dumping of their refuse in to the driveway. (TR. 64) The wall was built on the same line as the steel poles had been on. The north side of the wall was on his property line. (TR. 64 and 65). At time of trial Respondents were using the right of way for wreckers and flat top trucks without any difficulty. (TR. 65 and 66) The thickness of the wall was eight inches and went back about 55 feet. (TR. 68) The Wilkinson Building is encroaching on the right of way in that the footings of the buildings are probably 16 inches into the right of way. (TR. 68, 69 and 70) The Wall was necessary because it made an entrance to a driveway. Before, there was no existing driveway. They came in from any angle and it blocked him out. Traffic came in on a cross angle. If anybody was coming in through there, there was no chance of getting away from it. (TR. 81) He and Respondent, Harold Wilkinson, did get together and at one time agreed how high he should put the wall. He was going out to where the pipe was in the first place but Wilkinson talked him in to staying back aways. (TR. 84) Witness indicated that the east entrance of the driveway should be through the driveway. (TR. 84) It was not intended to be entered by cutting in from the north. They blocked him out from using the driveway when they went in that way. (TR. 85) With the wall, the Respondents had the same use of the Right of Way as they always had. There was an entrance to it. The wall had more or less cleaned up between the two buildings. (TR. 87) He intended to black top the area further and if done it would make the right of way 11.77 Feet wide up to the east end. (TR. 95)

Oscar H. Wood, a Witness for Appellant, testified: He took out the steel posts in December of 1955. They were five and a half inches outside measurement and as placed were from 4 1/2 to 5 feet above the ground. (TR. 100 and 101) They were located on the north line of the right of way. (TR. 101) The foundation for the wall was placed where the pipes had been. (TR. 103) He made a test and there is an abutment or post of the Wilkinson Building that sets out in the driveway about 17 inches. (TR. 107) Where Respondents are using the Right of Way on the west end it is about 14 feet wide. That he had no difficulty in driving his car down the driveway. The wall had removed a hazard. (TR. 111 and 112) He had seen oil poured in the right of way by Wilkinson employees. (TR. 113) After the wall was placed, there was no more oil in the right of way. (TR. 113) With the wall up the alleyway was straight and you could see from one end to the other. (TR. 117).

Respondents and Appellant rested. (TR. 123) The Jury was then taken to view the premises. (TR. 123)

Appellant reserves the right to make further statement of any pertinent fact not hereinbefore set forth.

The Court submitted the cause to the Jury on Special Interrogatories. Interrogatory No. 1 being: "Do you find by the preponderance of the evidence that the defendant designated an access on the northeast side of the 'red area' and that the plaintiffs accepted the access, used it, and the defendant then blocked it without the plaintiffs having abandoned said access?" (R 49) The

Answer of the Jury thereto was "Yes". (R 49) Interrogatory No. 2 was: "(Answer only if you have answered interrogatory No. 1 'Yes'.) Do you find proven by the preponderance of the evidence that the plaintiffs suffered damages as a result of the wrongful blocking of the access to the right-of-way by the construction of the wall in question?" The answer of the Jury thereto was "No". (R. 49)

Appellant promptly filed Motion to Set Aside the Verdict of the Jury and to enter Judgment Of No Cause Of Action or to grant a New Trial on the grounds that such Answers were inconsistent and that the Verdict was contrary to the evidence. Motion for New Trial was also joined therein. (R. 78 and 79) The Trial Court denied such Motions. (R. 91).

The Trial Court thereupon made and entered Findings of Fact and Conclusions of Law and Judgment approving the Answers of the Jury to said Special Interrogatories. (R. 85 to 90 Inclusive) Paragraph 3 of said findings of Fact is as follows: "That there would be no present and direct benefit to the plaintiffs to remove the said wall where it obstructs the access of the plaintiffs and the defendant should not be required to remove the wall but the access may be of value in the future, also public peace would be promoted by clearly defining each's right." (R. 87) By its Judgment the Court adjudged that plaintiff has a right of access to said right-of-way through the area in which Defendant constructed the wall for a width of 21 feet commencing at the easterly

end of the wall and plaintiff was allowed to remove the wall for said distance of 21 feet. The Plaintiffs were also granted nominal damages in the sum of 6 cents. (R. 89 and 90)

STATEMENT OF POINTS

POINT I.

THE COURT ERRED IN SUBMITTING SPECIAL INTERROGATORY NO. 1 TO THE JURY.

POINT II.

THE COURT ERRED IN ITS FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT.

ARGUMENT

POINT I.

THE COURT ERRED IN SUBMITTING SPECIAL INTERROGATORY NO. 1 TO THE JURY.

For purposes of clarification reference is herewith made to Respondents' Exhibit C. Same shows the Right of Way in Red, the Block Wall in Blue Stripes, the Steel Posts in Blue and also the Respondents' property for which the Right of Way was purchased in Yellow. Same also shows the respective Buildings of the parties hereto. Said Right of Way runs from the East to the West 160 Feet and from the Respondents' Property to the South 11 Feet. Respondents' Property is to the North of the Right of Way. Appellant's Property is South of the Right of Way. The Northeast Side of the "Red Area" is Respondents' Property upon which as shown by the Diagram there is no construction.

Further, Respondents' Exhibit B, now referred to, shows that Respondents purchased from Appellant and others the Yellow Area at the back of their property "Together with a Right of Way over and through the following described property." Thereafter the "Red Area" is described more fully. From the Certificate of Survey, Respondents' Exhibit A, the "Red Area" commences on the property of Appellant. Appellant's Exhibit 4 shows the Wall and the point where the Access in question is situated.

The case eventually turned on not whether Appellant was obstructing the Right of Way as granted by him to Respondents but whether or not Respondents could enter such Right of Way from any angle they wished.

The Trial Court recognized that the Right of Way was founded upon a Deed. That was substantially stated by the Court in the Court's Instructions 3 and 4. Basically, the case involved the interference with a Right of Way. This Court has held in *Nielsen vs. Sandberg,* 105 Utah 93, 141 P. 2d. 696, at Page 103 thereof as follows:

> "A right of way founded upon a deed or grant is limited to the uses and extent thereof as fixed by the grant or deed."

If this is followed then Respondents obtained a Right of Way or the Red Area to go to the Yellow Area and nothing more. However, the Trial Court interjected further point by giving to the Jury Instruction No. 5 (R. 56)

and Appellant Excepted to it. (TR. 125 and 126). Respondent also Excepted to certain portions of it. (TR. 124 and 125). Reference is made to such Instruction No. 5. (R. 56) It is quoted as follows:

> "The deed in question is silent as to where the plaintiff may enter the right-of-way on to the east. Because the right-of-way runs to a public highway, the law concludes the plaintiffs have a right to enter or leave at the meeting of the right-of-way and the public highway. The plaintiff would not acquire a right to enter the "red area" through the northeast side of the "red area" by any provision of the deed. However, if you find all of the following elements proven by the plaintiffs by the preponderance of the evidence, then you will find that plaintiffs did acquire such an access and the defendant wrongfully blocked it.
>
> The elements are:
>
> 1. That the defendant, Mr. Carlos Wood, either expressly or impliedly designated an access-way along the northeast side of the "red area".
> 2. That the plaintiffs expressly or impliedly accepted that designation and used the access.
> 3. That the plaintiffs did not either expressly or impliedly surrender said access, if any, on the northeast side of the "red area" before the wall was built.

> If you find each of these elements so proven, you will answer interrogatory number one "yes" and proceed to the next interrogatory. If you answer "no" you have disposed of the case and need not consider the other interrogatories."

Down to the word "However", Appellants have no quarrel with such Instruction. From such word on the Instruction had no basis in fact nor law for being given.

The evidence of Respondents was that the Steel Posts consisting of Three were erected. (TR. 27) Respondents stated date of erection thereof as November, 1954. (TR. 38) Appellant stated they were erected on Thanksgiving Day of 1953 (TR. 58) after a survey so they would be on his property line. (TR. 58) Appellant and Respondent, Harold Wilkinson, did get together and agreed on how high the wall should be at one time. (TR. 84) This fact was not disputed by Respondents. The wall was built on the same line as the steel poles had been on. (TR. 64 and 65) Also, in measuring the right of way width, they measured from the south side of the steel posts. Appellant's Exhibit 1 is a picture of the sturdy steel posts so removed. Respondents admitted they had no right of way over Appellant's property before they purchased the right of way. (TR. 35 and 36) Before the wall was erected the right of way demarcation was indicated by three steel posts. (TR. 47) Respondents made no protests when the steel pipes were placed on the right of way. (TR. 49)

Under such facts presented to the Court, Appellant con-

tends that the Instruction complained of was not pertinent to this case. The Trial Court semed concerned about an easement of access which was not a part of this case. The easement was the right of way founded upon the deed.

The Trial Court while instructing the Jury as aforesaid did not enlighten the Jury on the meaning of the word "Access". Appellant testified that Respondents instead of using the "Access" or east entrance to the driveway would come from the side and use it sideways and come right in to his traffic and it created a bad situation. (TR. 63) Appellant surely was certain of such meaning. In *Dexter & N. R. Co. vs. Foster,* et al, 119 N.Y. S. 731, 64 Misc. Rep. 500, the Court at page 733 says:

> "The word 'access' is defined as a way of approach or entrance, passage, path, means of approach, way of entrance, or passage to anything."

The Trial Court determined that the Jury decide the case on access without defining it for the Jury. It was not too much of import that the easement or right of way was founded on a deed. The Trial Court in said Instruction No. 5 (R. 56) informed the Jury that the deed was silent as to where the plaintiff could enter the right of way. No Deed usually contains or sets forth such port of entry. The right of way is defined by the Deed and that is its extent.

The Trial Court overlooked the fact that the particular access involved was not one from a highway but actually from the property of Respondents. Construction of the Deed, Respondent's Exhibit B, cannot make appurtenant the property of Respondents other than the Yellow Area to the Right of Way. In 17 Am. Jur. Sec. 119, Page 728 the following is stated:

> "A grant or reservation of a right to pass upon a private way to one lot does not confer the right to pass further upon the same way to another lot. Similarly, a right of way appurtenant to a particular tract cannot be used as a mode of access to another lot to which it is not appurtenant even though there is no resulting burden."

By his acts in placing steel posts on the boundary line of the right of way, Appellant cannot be accused of designating any access way to Respondents. Further, the steel posts were removed and the wall complained of was placed as the line of demarcation. Appellant had absolute right to fence the right of way. In *Willing vs. Booker,* 168 S. E. 417, 160 Va. 461, at Page 419 thereof the Court says:

> "Ownership of land carried with it the right to a division fence on common boundaries of adjoining lands. The right and the burden of owners of adjoining land are common and legal. That different estates or interests may exist in one parcel of such lands does not destroy or affect the com-

> mon right and burden. Each estate and interest in each parcel of the land may enjoy the right, and from it's inception is subject to the possible burden of the exercise of the right unless it has been freed expressly or impliedly by the parties (or their predecessors in the title) who own each of the adjoining parcels of land and those creating the estate or interest."

Absolute disregard of the inherent right of Appellant to fence the right of way was made. The Trial Court in submitting such Interrogatory neglected this fundamental factor in the case. In 28 C. J. S. Sec. 98 (a), Page 780 it is stated:

> "The owner of the servient estate may erect fences along the sides of a way, but not across or within the way so as to obstruct it entirely."

The Trial Court failed to consider at all times the right of Appellant to fence the way and his right to rely on the construction of the Deed as to the extent of the easement granted Respondents.

In *Dyba vs. Borowitz,* 136 Pa. Super. 532, 7 A. 2d. 500 the real crux of the issue in this case was met head on. The Court at page 501 thereof says:

> "The oft repeated rule is that the words in a grant are to be construed in their ordinary and natural sense, and that they are to be given a reasonable construction in accord with the intention of the parties. * * * We find no words in this

> grant that expressly or impliedly forbid the erection of boundary fence, nor does the proof establish any circumstances that deprives defendant of that right. There was no proof or finding of fact by the chancellor of any interference with the right of ingress, egress and regress 'through and over' the alley. Concedely, no gates, barrier or obstruction of any kind was erected therein that would deprive plaintiff of the use of it. They have access to either terminus as they did prior to the erection of the fence. We think the language of the grant does not justify the conclusion that the plaintiffs have the privilege to enter or cross the alley at any point.''

In the case at bar, no interference with Respondents' right of ingress, egress and regress through and over the right of way was proven. They still used it the same as before. They still had access to either terminus as before. Truly, the language of the Deed, Respondents' Exhibit B, did not grant to them the right to enter or cross the right of way at any point they desired. Appellant did not substantially interfere with the easement he granted Respondents. Quoting further from the case of *Dyba vs. Borowitz,* supra, the Court at Page 502 thereof says:

> ''In *Mercantile Library Co. vs. Fidelity Trust Co.,* supra, (235 Pa. Page 15, 83 A. Page 595) the Court said 'The owner of the servient soil has the right to make use of his property as he chooses,

if by so doing he does not substantially interfere with the easement'. Other cases sustaining this principle are *Connery vs. Brooke,* supra, *Hartman vs. Frick,* 167 Pa. 18, 31 A. 342, 46 Am. St. Rep. 658, *Graham vs. Water Power Corp.,* supra, *Kohler vs. Smith,* 3 Pa. Super. 176, *Helwig vs. Miller,* 47 Pa. Super. 171; *Ziegler vs. Hoffman,* 78 Pa. Super. 115.

While we have found no case and none has been cited expressly deciding the question before us, the right to build a fence along a right of way is generally recognized in other jurisdictions. See *Guse vs. Flohr,* et al. 195 Wis. 139, 217 N. W. 730, *Good vs. Petticrew,* et al., 165 Va. 526, 183 S. E. 217; *Willing vs. Booker,* 160 Va. 461, 168 S. E. 417. 'Unquestionable the owner of a servient tenement may fence along the way or not, as his convenience may dictate' 9 R. C. L. p. 801, Sec. 56. 'The owner of a servient estate may erect fences along the sides of a way, but not across the way as to obstruct it' 19 C. J. p. 986, Sec. 240.

It is true that there was no fence when this easement was created and none was erected for a period of almost eighteen years thereafter, and those facts are worthy of consideration. But they are not sufficient to deprive the servient owner of his inherent right to use his property as he sees fit, including the erection of a division fence with suitable access to the easement. It must be borne

> in mind that all that was granted was a right of way 'through and over two and ninety six hundredths (2 16/.00) feet wide.' The fundamental right to erect a fence upon the boundary line cannot be taken away from the owner of the fee by that language."

Appellant did not intend that such easement be so used by Respondents with the resultant burden to him. Construing, as we must, the Deed, he assumed that the Right of Way was to be over the 11 feet only and carefully preserved open either and both terminus thereof. This Court in *Wade vs. Domais,* 52 Utah 310, 173 P. 564, at Page 316 thereof quotes with approval as follows:

> "In *Norris vs. Blant,* 49 Utah at Page 243, 161 Pac. at Page 1133, this Court says: 'In construing any grant of right of way the use, in character and extent, is limited to such as is reasonably necessary and convenient to the dominant estate and as little burdensome to the servient estate as possible for the use contemplated.' ."

Appellant asserts that the use demanded by Respondents placed a burden on the servient estate not contemplated by the Deed. In *Houghtalling vs. Stoothoff,* 19 N. Y. S. 2d. 510, the Court at Page 511 says:

> "Plaintiff is entitled to nothing more than an unobstructed right of passage. Provided only that the right of passage is not obstructed, the owners of the servient tenement are entitled to fence their

land. *Bail vs. Bail,* 108 N. Y. 511, 15 N. E. 538."

Appellant clearly recognized the right of Respondents and provided such unobstructed passage to which they are entitled. The Deed cannot possibly be construed to grant Respondents port of entry as interpreted by the Trial Court. If this be so, then all Deeds granting Easements had best specify such port of entry or negative such entry at all angles chooseable to the holder of the same.

Under the facts and the law it was truly error on the part of the Trial Court to submit the cause to the Jury on solely Interrogatory No. 1. Even so, the Answer of Yes thereto of the Jury is contrary to the evidence. The Jury completely ignored the fact that there had been steel posts on the property line and that Appellant and Respondent, Harold Wilkinson, did get together and at one time agreed how high the wall should be placed. (TR. 84) This testimony of Appellant was never controverted and could not support a finding that Appellant designated an access-way. Respondents were fully aware that they were not to use the Northeast Side of the "Red Area" to enter upon said 11 Feet. Under the evidence before it the Jury in making such Answer rendered a Verdict absolutely contrary to the evidence and not supported by such evidence. However, considering the Answer of No of the Jury to Interrogatory No. 2 with its Yes Answer to No. 1, there is no doubt that the Jury was completely confused by the erroneous Instruction No. 5 of the Court and also the erroneous Interrogatory No. 1.

POINT II.

THE COURT ERRED IN ITS FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT.

Upon rendition of such Answers by the Jury, Appellant promptly filed Motion and Motion For New Trial (R. 78 and 78A) pointing out to the Trial Court the error and inconsistency of the Answers of the Jury and requesting entry of Judgment Of No Cause of Action or that a New Trial be granted. Appellant submitted to the Trial Court a Memorandum Of Authorities. (R. 79 to 84 Inclusive). Reference thereto is herewith made.

Thereafter the Trial Court apparently adopted and approved the Answers of the Jury and made and entered Findings of Fact, Conclusions of Law and Judgment based thereon. (R. 85 to 90 inclusive). While stating that such Answers were adopted and approved, the Trial Court, despite the Answer of No of the Jury to Interrogatory No. 2 by which the Jury found that Respondents suffered no damage, proceeded to award to Respondents against Appellant nominal damages of 6 cents. This was error as a verdict for no damages can never be construed as one for nominal damages. The rule is well stated in 25 C. J. S. Section 189 (A) as follows:

> "A verdict for 'no damages' cannot be construed as one for nominal damages."

Also in *Mendenhall vs. Struck,* 207 Iowa 1094, 224 N. W. 95, the Court at Page 1100 thereof states:

> "A 'no damage' verdict cannot be viewed as a verdict for nominal damages."

Having by Paragraph 1 of the Findings of Fact (R. 86) approved the Answers of the Jury, the Trial Court then proceeded to enter Judgment absolutely contrary thereto.

There is additional Finding of Fact of the Trial Court which does not support the Judgment as rendered by the Trial Court. Note is made of Paragraph 3 of the Findings of Fact of the Court. (R. 87) Quotation thereof is made: "That there would be no present and direct benefit to the Plaintiff to remove the said wall where it obstructs the access of the plaintiff and the defendant should not be required to remove the wall but the access may be of value in the future, also public peace would be promoted by clearly defining each's right." The Trial Court, apparently viewed the Answers and Verdict of the Jury as being for the Appellant, but then proceeded to enter Judgment against Appellant that Respondents could remove the Wall for 21 Feet. Respondents in this action sought injunctive relief. They were not entitled to the same. Respondents indicate by their Statement of Points of Respondents on Appeal (R. 97) that they will contend that the entire wall should be removed. Determination of 21 Feet of removal of the wall is not satisfactory to them. It is somewhat conjecture as to how such 21 Feet was arrived at by the Trial Court. Referring to Respondents' Exhibit C, the Diagram, the Easement with the Wall was substantially the 11 Feet width as called for by the Deed. Despite the use of the word "wrongful" in Interrogatory

No. 2, (R. 49) the Jury found no damages resulted to Respondents. The Answer of the Jury could not have been otherwise under the evidence submitted by Respondents on the question of their damages. Thusly, the Trial Court found that there would be no present and direct benefit to Respondents to remove the wall. The evidence showed no substantial interference with the Easement of 11 Feet and the Jury found Respondents suffered no damage. Respondents should thereupon have been denied the relief they sought. It was error for the Trial Court to do otherwise. In *Clough vs. W. H. Healy Co.* 53 Cal. App. 397, 200 P. 378, the Court at Page 379 thereof says:

> "To entitle complainant to equitable relief the right must be clear and an injunction of the character herein in question will be denied when the obstruction does not constitute a material interference with the right of the owner of the easement, or where the damage sustained by him is merely nominal. * * * In the case at bar there was no wilfull or deliberate invasion of the plaintiff's right of way, nor was there any breach of the agreement respecting it after its change of location. The plaintiff has suffered no damage."

Respondents, upon the evidence adduced by them showed no right to the relief demanded by them and no right to the removal of the wall or any portion thereof. Their principal and only complaints against the wall were that it took them two to three minutes more to move automobiles; (TR. 31) that they estimate suffer-

ance of daily loss of two man hours; (TR. 31) and that they would have more use of the 11 feet. (TR. 33) Appellant stated that it was for the benefit of both that it be used as a driveway. (TR. 62) Instead of using the "Access" or east entrance to the driveway they would come from the side and right in to his traffic. (TR. 63) Appellant's object in building the wall was to make a definite right of way down through the two businesses and to stop their dumping of their refuse in to the driveway. (TR. 64) Appellant showed use by Respondents of the easement beyond its original purpose. Respondents were casting a greater burden on it than permissible. In 17 Cal. Jur. 2d. Section 27, at Page 131, it is stated:

> "The owner of an easement has no right to commit a trespass on the servient tenement. He must use the easement in such a manner as to impose as slight a burden upon the servient estate as practicable."

The Trial Court by it Finding of Fact, Paragraph 3 and heretofore quoted, chose to delve in to the future, while finding that presently there was no benefit to Respondents by removal of the wall. The obstruction was required to be a material interference with Respondents' use of the right of way before the Trial Court could act. The present was involved not the future. In 17 Cal. Jur. 2d. Sec. 50 at Pages 163 and 164 it is stated:

> "But an injunction will be denied where the obstruction sought to be removed does not constitute a material interference with the right of the owner of the easement, or where the damages sustained by him is merely nominal. Where removal of the obstruction would bring no actual advantage or the expenses entailed thereby would be entirely disproportionate to the benefit resulting, the complainant will be relegated to his legal remedy for the vindication of his right."

The interest of the Trial Court as stated in said Paragraph 3 of the Findings, heretofore quoted, regarding promotion of the public peace was adequately provided for by Paragraph 5 of the Findings (R. 87) whereby the parties stipulated in Open Court that a permanent injunction issue against both parties from blocking the right of way. The Judgment in Paragraph 3 thereof, (R. 90) permanently enjoins both parties from blocking or obstructing the right of way. Such enjoinment of both parties should have disposed of the case but the Trial Court deemed it requisite to allow removal of 21 Feet of the Wall by Respondents. Appellant was entitled to maintain the Wall or he was not entitled to do so. The Judgment of the Trial Court is erroneous in granting such removal of the portion of the Wall and in awarding Respondents nominal damages from Appellant.

CONCLUSION

By reason of the palpable errors of the Trial Court in this cause, the Findings of Fact, Conclusions of Law and Judgment should be by this Court set aside and reversed and the cause Remanded back to the Trial Court with directions to enter Judgment Of No Cause Of Action in favor of Appellant and against Respondents but with the Trial Court to enjoin both parties in such Judgment from blocking or obstructing the right of way.

Respectfully Submitted,

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